Supreme Court of the United States

October Term, 1960

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

MOTION TO DEFER CONSIDERATION OF PETITION

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Supreme Court of the United States

October Term, 1960

No. .....

UNITED MINE WORKERS OF AMERICA; DISTRICT 12, UNITED MINE WORKERS OF AMERICA; LOCAL UNION 1227, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNION 1229, UNITED MINE WORKERS OF AMERICA, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

MOTION TO DEFER CONSIDERATION OF PETITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, United Mine Workers of America, District 12, United Mine Workers of America, Local Union 1227 and Local Union 1229, both of United Mine Workers of America, and each of them, pray that a writ of certiorari issue to review those parts of the opinion of December 2, 1960, and the orders, judgments and decrees of the United

[1] United Mine Workers of America is called "UMW"; District 12, United Mine Workers of America, "District"; and Local Unions 1227 and 1229, United Mine Workers of America, "Local 1227" and "Local 1229", respectively. Collectively, they are called "Unions".

[2] Herein referred to as either the "Court of Appeals" or "Seventh Circuit".

States Court of Appeals for the Seventh Circuit entered December 2, 1960 and April 5, 1961, respectively, which are adverse to Unions, in Consolidated Cases Nos. 12889, styled *Perry Coal Company and Peabody Coal Company, et al, Petitioners* v. *National Labor Relations Board, Respondent,* and No. 12915, styled *United Mine Workers of America, et al, Petitioners* v. *National Labor Relations Board, Respondent,* wherein the Seventh Circuit enforced, as modified, an order of the National Labor Relations Board[3] dated December 30, 1959, against Peabody Coal Company and Unions.

A certified Appendix record in said Consolidated Cases together with the proceedings in the Seventh Circuit, is furnished herewith, in accordance with the Rules of this Court.

OPINION BELOW

The Seventh Circuit's opinion appears in the Appendix hereto at page 1a, *et seq.*; in the Certified Record; and it is reported in 284 F. 2d 910.[4]

JURISDICTION

On December 2, 1960, the Court of Appeals handed down its decision and opinion and entered its order and judgment that Board's order "be modified as indicated in the opinion of this Court filed this day, and as so modified the said order will be enforced." (A. 13a).[4a] A petition for rehearing, filed by Board, was denied January 17, 1961 (A. 13a). On February 27, 1961, Associate Justice Tom C. Clark, by order, upon petitioners' application, extend-

[3] Herein called "Board".

[4] There is currently pending and undecided a Board Petition for Clarification Or Modification of the Court's opinion.

[4a] The abbreviation "A" refers to the Appendix to this Petition. The abbreviation "R" used herein refers to the Joint Appendix in the Seventh Circuit and filed with this Court.

ed time for filing petition for writ of certiorari to and including May 1, 1961. On April 5, 1961, the Court of Appeals entered its decree in conformity with its decision of December 2, 1960.

The jurisdiction of this Court is invoked under 28 USCA 1254(1) and 2101(c) and Section 10(e) and (f) of the National Labor Relations Act, as Amended, 61 Stat. 147, 29 USCA 160(e), (f).

QUESTIONS PRESENTED

I. Where, following a campaign between two competing labor unions to organize employees of two coal mines, the losing union charges and the National Labor Relations Board finds that employers coerced employees and unlawfully assisted the successful union and recognized it when it did not represent an uncoerced majority, all to encourage membership in the successful union, and a federal court of appeals, reviewing such findings, though expressly finding that employees were not coerced and that the employees at both mines, by cards, and by election at one mine, had indicated their choice of the recognized union at the time the collective bargaining agreement was entered into, yet refuses to disturb Board's findings because they are based upon credited statements attributed to, but denied by, company officers, which are isolated and taken out of context, and the furnishing of partial and incorrect employee lists to the recognized bargaining agency, which the reviewing court regarded "of relatively small importance" and "a slender reed", but, like Board, ignores and fails to give consideration to other undisputed evidentiary data challenging the findings and holdings of both the reviewing court and the Board,

(a) Does the evidence upon which the court and Board predicated their findings and holdings suf-

fice to constitute substantial evidence on the record considered as a whole to sustain Board's findings and conclusions of such unfair labor practices, and,

(b) Does it suffice to warrant the court's decree that both employer and the employee-designated bargaining agency cease giving effect to the collective bargaining agreement, which the court held to be valid, and that the employer withhold recognition from such representative which the court admits had been chosen by the employees when the agreement was entered into, until the chosen representative establishes majority representative status pursuant to a Board-conducted election?

II. Where the National Labor Relations Board has found that Unions are guilty of violating the Act's 8(b)(1)(A) by reason of a letter's being coercive in that its "plain intent and reasonable effect" was that employees would be required as a condition of employment to become UMW members and that employees' right to select their own representative was curtailed, and a federal court of appeals, reviewing such findings, expressly finds and holds that no employee complained of coercion or discrimination, that no employee lost his job, that membership in the Unions was not an employment condition, that employees at the two mines, by cards, and by election at one one mine, indicated their choice of the Unions and that there are no findings of actual coercion or evidence which would have supported such findings, and the Board ignores and fails to give consideration to evidentiary data challenging the Board's findings and holdings,

(a) Does the evidence upon which the Board predi-

cated its findings and holdings suffice to constitute substantial evidence on the record as a whole to sustain Board's findings and conclusions of Section 8(b)(1)(A) violations, and

(b) Does it suffice to warrant the court's decree that Unions cease restraining or coercing the employees in their right to select or not to select such Unions as their bargaining representative and to join or not to join such organizations, and that the Unions cease giving effect to a collective bargaining agreement between them and the employer of said employees until they establish their majority representative status pursuant to a Board-conducted election?

STATUTES INVOLVED

The pertinent statutory provisions involved are Sections 8(a)(1), (2) and (3), 8(b)(1)(A) and 10(e) and (f), Labor Management Relations Act, 1947 [29 USCA Sections 158(a)(1), (2), (3), 158(b)(1)(A), and 160(e) and (f)].

STATEMENT OF THE CASE

This case concerns UMW's selection as exclusive collective bargaining representative of employees at two mines: (1) a strip mine (called "Millstadt") at Millstadt, Illinois, owned and operated by Midwest-Radiant Corporation, and (2) a deep mine (called "O'Fallon"), owned and operated by Perry Coal Company, at O'Fallon, Illinois. By merger and liquidation, Peabody Coal Company acquired these properties on or about October 2, 1957, when Peabody recognized, and since has recognized, UMW as bargaining representative of employees of the two mines.

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[2] Peabody Coal Company, Midwest-Radiant Corporation and Perry Coal Company are called "Peabody", "Midwest" and "Perry", respectively. Collectively, they are referred to as "Companies".

It reflects a struggle between UMW and Progressive Mine Workers of America, District 1,* to represent said employees, who had, by cards, and by election at one of the mines, indicated their choice of UMW following organizational campaigns conducted by both UMW and Progressive. Thereafter, on October 1, 1957, Peabody entered into a collective bargaining agreement with UMW covering the employees at the two mines.

No employee of either mine complained of coercion, restraint or discrimination or loss of job or threat thereof. No employee filed charges. But Progressive filed charges against Unions (R. 578, 630) and Companies (R. 562, 570, 581, 585, 628), and thereafter Board issued complaints against both Unions (R. 588) and Companies (R. 593), and consolidated the cases for hearing. Denials of the complaints' allegations and other defenses thereto appear in Answers filed by Unions (R. 601) and Companies (R. 609-27). A hearing was held before a Board Trial Examiner, to whose Intermediate Report and Recommended Order (R. 6), holding Unions and Companies guilty of unfair labor practices, Unions and Companies filed their respective Exceptions (R. 156, 135).

Approval by Board of the Examiner's holding that Companies and Unions were guilty of unfair labor practices resulted in Unions' (R. 75) and Companies' (R. 68) filing in the Seventh Circuit separate petitions to review and set aside Board's decision and order. Board sought enforcement.

The Seventh Circuit, consolidating the two appeals, rendered its opinion December 2, 1960; and by order entered the same day adjudged that Board's order "be modified as indicated in the opinion . . . and as so modified the said order will be enforced" (A. 13a).

* Called "Progressive".

Board's Findings and the Seventh Circuit's Decision.

Finding the agreement entered into between Peabody and Unions contained illegal union-security provisions (R. 55-6), Board found Peabody unlawfully assisted Unions and had violated Sections 8(a)(1) and (3) by entering into the agreement when Unions did not represent an uncoerced majority of the employees, and by thereafter maintaining the agreement (R. 56). Likewise, Board found Unions violated Section 8(b)(2) by unlawfully causing or attempting to cause Peabody to discriminate against employees by demanding, in June and July, 1957, that Peabody enter into a collective bargaining agreement containing union-security provisions which Board found to be illegal (R. 56), and that Union violated both Sections 8(b)(1)(A) and (2) by entering into the agreement with Peabody on or about October 1, 1957 and thereafter maintaining it (R. 56). The Seventh Circuit, however, held the contract to be valid, thereby rejecting Board's findings and conclusions that Peabody had violated Sections 8(a)(1) and (3) and that UMW had violated 8(b)(1)(A) and (2) by reason of such matters (284 F. 2d 914-5, 917; A. 7a, 11a).

Board found, too, that Peabody had violated Section 8(a)(2) and (1), not only by entering into the agreement with Unions on or about October 1, 1957, when, as the Board found, they did not represent an uncoerced majority of the employees (R. 56), but also because Peabody (a) furnished UMW a list of employees' names and addresses at the two mines (R. 54); (b) discriminatorily locked out employees at the mines in July, 1957, and threatened them with continued lockout; and (c) refused to bargain with Progressive,[1] terminated its contract and

[1] The Board found that these acts also constituted a Section 8(a) (5) and (3) violation.

discontinued payments to Progressive's Welfare and Retirement Fund (R. 38, 54).

However, though the Seventh Circuit's opinion declared, "No employee claims his rights under Section 7 were violated", and "no employee at either mine lost his job", and "An employee did not need to belong to UMW to retain his employment", and "there are no findings of actual coercion . . . nor any evidence which would have supported such findings" (284 F. 2d 914, 916; A. 7a, 10a), the Seventh Circuit did not disturb Board's findings that Peabody had unlawfully assisted and supported UMW, and interfered with, restrained and coerced employees, thus negating UMW's right to represent the employees as their bargaining representative despite the Seventh Circuit's specific admission that "at the time of the contract with Peabody, employees at both mines, by cards, and by election at O'Fallon, indicated their choice of UMW" (284 F. 2d 916; A. 10a). Board, like its Examiner, ignored vital undisputed evidence which challenged the findings of unlawful assistance and support to UMW. These undisputed factual matters were likewise totally ignored by the Seventh Circuit in its failure to reverse Board's findings of Peabody's unlawful assistance and support to UMW and to refuse to enforce Board's order in relation to such findings.

The Seventh Circuit bases its approval of the Board's findings of the Examiner and the Board, relying "to a considerable extent upon statements made by" officers of the employers; and while the officers "denied making many of the statements relied upon", the Seventh Circuit declared that "we cannot disturb credibility resolutions made by the Board" and that "The weight to be attached to and the credibility to be accorded testimony is a matter for the trier of the facts" (84 F. 2d 913). It

also declared that it was not disposed to interfere with the Board's decision as to the effect of furnishing mailing lists to UMW as an act constituting illegal assistance, though noting that it deemed it "a slender reed on which the Board in part rests its decision" and "of relatively small importance in this case" (284 F. 2d 913-4).

In addition, according to Board, "Unions violated 8(b)(1)(A) also by unlawfully restraining and coercing employees in the exercise of their Section 7 rights, by the following acts: (a) on July 1, 1957, by letter, and on July 3, 1957, by newspaper, informing employees at the Millstadt and O'Fallon mines that UMW was requiring Peabody to apply the UMW contract (R. 39-40, 56); and (b) on or about October 1, 1957, entering into a collective bargaining agreement with Peabody, covering employees at the two mines, and thereafter maintaining and enforcing said agreement, which, as Board declared, contained illegal union-security provisions and under which employees were required to pay dues, fees and assessments to UMW and (c) curtailing employees' rights to select their agent (R. 40, 56).

The Seventh Circuit rejected Board's requirement based upon Board's finding that employees were required to pay dues and other moneys to UMW, that Peabody and Unions reimburse employees for dues, fees, assessments and other moneys paid by them, as well as Board's order that they make the employees whole for any loss suffered because of discontinuance of payments to Progressive's Welfare and Retirement Fund (284 F. 2d 916-7; A-10a-11a).

While the Seventh Circuit's opinion contains no discussion of Unions' position, asserted in that Court, that the record is barren of any predicate for Board's findings that Unions were guilty of coercive conduct within Sec-

tion 8(b)(1)(A)'s meaning, the Seventh Circuit does proclaim in its opinion (284 F. 2d 914, 916; A. 2a, 10a) that there is a total lack of employee complaint of coercion and restraint, and that "there are no findings of actual coercion . . . nor any evidence which would have supported such findings, that "There is clear evidence in the record that membership in UMW was not a condition of employment", that "No employee claims his rights under Section 7 were violated", that "no employee at either mine lost his job", that "Membership in UMW was not a condition of employment" and that "An employee did not need to belong to UMW to retain his employment" (284 F. 2d 916, 914; A. 10a, 7a).

The Seventh Circuit's Decree

On April 5, 1961, in conformity with its December 2, 1960 opinion, the Seventh Circuit ordered that Peabody cease and desist from, *inter alia*, (1) giving effect to the collective bargaining agreement entered into on or about October 1, 1957, with Unions, or to any extension, renewal or modification thereof; (2) recognizing Unions as representative of its employees at the two mines unless and until they shall have demonstrated their status as such pursuant to a Board-conducted election, which, the Court mandated, is "to be conducted as early as possible under applicable rules, regulations and practice"; and (3) assisting and contributing support to Unions or any other labor organization (A. 14a).* The Seventh Circuit's or-

* The Seventh Circuit's order also commands Peabody to cease and desist from encouraging membership in Unions or any other labor organization "by discriminating in regard to hire or tenure of employment or any term or condition of employment, except to the extent permitted by the proviso to Section 8(a)(3)" and in any other manner interfering with, restraining or coercing employees in the exercise of their right to join Progressive or any other labor organization (A. 14a-15a).

der specifically provides, contrary to Board's order, that "Peabody need not bargain with any union claiming to represent the employees at the O'Fallon and Millstadt mines until the Board has certified the results of the election so held" (A. 14a).

Affirmatively, the Seventh Circuit's order, *inter alia*, requires that Peabody withdraw and withhold all recognition from Unions as the representative of its employees at Millstadt and O'Fallon unless and until Unions shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election.

Under the Seventh Circuit's decree, Unions are also required to cease and desist from giving effect to the October 1, 1957 agreement with Peabody or to any extension, renewal, modification, supplement or other contract with it, unless and until Unions shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among the Millstadt and O'Fallon employees (A. 16a).

Although the Seventh Circuit's opinion directed Board's order "should be limited to UMW's and Peabody's actual unfair labor practices in this case" (284 F. 2d 917; A. 11a), and despite the Seventh Circuit's various unequivocal holdings that employees were not coerced, it nevertheless ordered Unions (A. 16a) cease and desist from

> "Restraining or coercing the employees of Peabody Coal Company, at its O'Fallon and Millstadt mines in the right to select or not to select the United Mine Workers, its District 12 and its Locals 1227 and 1229 as their bargaining representative and to join or not to join said labor organiza-

The Seventh Circuit's decree also mandated that Peabody make whole the O'Fallon and Millstadt employees "for any loss of earnings" suffered by reason of the discriminatory lockout. It also required posting of notices (A. 15a).

tions, except to the extent that such right may be affected by an agreement executed as authorized by the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959."[10]

THE FACTS

1. Background

At times material herein, Hugh White was District's President; H. C. McCollum was Peabody's Vice President in charge of underground mines (R. 438); and William V. Hartman was Peabody's general superintendent concerned primarily with strip mines (R. 375). From April, 1957, until Perry was absorbed by merger with Peabody, McCollum was Perry's Vice President (R. 438-9); while Hartman, as Midwest's Vice President, supervised the Millstadt mine from about April 1, 1957 (R. 375).

a. Progressive's Bargaining Agreement.

According to Ray Dupee, Progressive's president, in May and June, 1957, Progressive was, and since 1938 had been, bargaining representative of employees at the two mines, where it had "set up" Local Unions 75 and 167 (R. 203-4). There is no evidence that Board had certified Progressive as the bargaining agency.

In the Spring, 1957, there was effective at the mines a collective bargaining agreement between Coal Producers Association of Illinois[11] and Progressive (R. 658). Either signatory could on or after September 30, 1957, terminate the agreement by giving at least sixty days' written notice (R. 668, 670).

b. UMW's Bargaining Agreement With Peabody.

Illinois Coal Operators Association, of which Peabody had been a member as far back as 1950 (R. 555), was a

[10] Under the Seventh Circuit's decree, posting of notice is also required (A. 16a).

[11] Herein called "Coal Producers".

signatory to UMW's National Bituminous Coal Wage Agreement, which was effective at Peabody's 27 mines (R. 277).

2. Facts Relating to the Alleged Coercion, Restraint and Discrimination.

The Agreement covered "all of the bituminous coal mines owned or operated" by signatories thereto (R. 700), which included Peabody's 27 mines (R. 277) and was applicable to all coal lands owned or held under lease by Peabody, or any subsidiary or affiliate, or acquired, which might be put into production (R. 700-1).

In processing the Agreement in 1956 and 1957, White met at various times with McCollum and with Hartman.

Peabody had no understanding it would see that no other union than UMW represented employees (R. 462). To White's inquiry in May and June, 1957,[a] concerning UMW recognition at Millstadt and O'Fallon, McCollum and Hartman each advised White recognition could be forthcoming only upon termination of Progressive's contract, a majority of employees' joining UMW and "all legal requirements complied with" (R. 441, 376-8, 286-7, 288). Hartman told White "it is up to the men to decide who they want" (R. 418). McCollum denied Peabody's practice was to apply the UMW contract to its newly-acquired properties "without regard to the employees" (R. 461), while Hartman denied there was agreement that the two mines should be included under the contract's language or that he advised White that Peabody would recognize UMW after cancellation of Progressive's contract (R. 418).

[a] Unless otherwise stated, all dates refer to the year 1957

a. UMW Conducts an Organizational Drive for Membership Among the O'Fallon and Millstadt Employees.

Employees at O'Fallon and Millstadt were on vacation from June 28 through July 8, 1957.

A July 1 letter, written by White, mailed to O'Fallon and Millstadt employees (R. 685, 693, 257-8) and published in newspapers in Belleville, Illinois (R. 697) on July 3 (R. 261-2), noted "the contract applies, or covers, all of the bituminous coal mines owned or operated by" the Agreement's signatories; that recently UMW "has served notice on" Peabody it "must comply" therewith and "all provisions of the contract be applied to" the two mines. It stated UMW is "REQUESTING"[12] "each and every employee . . . become" UMW members, and that District and UMW "EXTEND A CORDIAL INVITATION to all employees . . . to affiliate with" UMW "and participate in the benefits as outlined in this letter." The letter explained there would be "no initiation fee charged", dues would be $4.25 a month, and that invited employees would have the same rights and privileges as any other UMW members "who has never been a" Progressive member, such as benefits of pensions, hospitalization and medical care, and funeral expenses and widow and survivors benefits to be derived from UMW Welfare and Retirement Fund. A membership card, with a stamped, self-addressed envelope, were enclosed and each employee was "requested to sign and return [the card] promptly to the District office".

In mailing these letters, White used lists of employees' names and addresses which White had requested of, and which had been given to him by, McCollum and Hartman—lists which White found to be "partial" and incor-

[12] All emphases, unless otherwise indicated, are supplied.

rect (R. 259-60, 273, 274).[13] Such lists were available to people without restriction and have been given to charity organizations, insurance companies, persons selling magazines and others (R. 484-5, 422).[14]

Mailing of the letters and publication of the newspaper ads were followed by an organizational campaign, participated in by White and three others (R. 262). The reason for then starting the UMW campaign was that both UMW (R. 716-7) and Progressive (R. 670) contracts required 60-day termination notices prior to September 30, 1957 (R. 279, 280).

UMW organizers were assigned to organizing the four hundred employees, some of whom lived in Belleville and some in outlying territories (R. 263-4). Employees were asked if they had received White's letter, and if the answer was no, a copy was furnished "and in the final analysis we would ask them to sign the card which I am calling application for membership" (R. 532), or "to consider signing applications" for UMW membership (R. 531). Some individuals asked "for more cards than one" and, as UMW Board member Shannon stated, "we encouraged them to accept those cards if they were sympathetic with our union" (R. 533). Cards which were signed were then mailed to District's office in Springfield or turned over to President White in Belleville (R. 532-3). No employee complained that he was coerced into signing a card.

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[13] According to White, there were approximately 100 incorrect addresses, and that approximately that number of the letters and cards were returned to the District office undelivered (R. 290-1).

[14] McCollum testified White told him he was going to attempt to organize the employees (R. 460). While there is no testimony Hartman knew why White wanted the list, Hartman stated he had "my own idea" (R. 405).

John Marchiando, an O'Fallon employee and a former Progressive International President, phoned White "it was about time" for UMW to "try to organize that mine" (R. 540). On the basis of signed cards (R. 266), White informed "the coal company that we represented a majority of the employees" at the two mines (R. 267).

A July 10 letter (R. 717) from White to McCollum formally advised "Full compliance to the terms" of the wage agreement "is expected from" Peabody to UMW. It was not sent to employees.

b. Progressive Conducts a Counter Drive.

Following UMW's pattern to persuade employees to join it, Dupee, by letter of July 5, published in Belleville papers (R. 236, 239, 729) and mailed to employees (R. 749, 753), urged them "for your own protection and benefit" to disregard UMW invitations and not to sign UMW cards. It professed Progressive's contract a better one than UMW's; and although under Progressive's contract beginning August 1, 1955, Progressive Welfare and Retirement Fund payments were, with Progressive's consent, reduced from 40 to 20¢ (R. 660, 662), while UMW Welfare and Retirement Fund payments were 40c (R. 700), Dupee's letter stated under Progressive's contract, "YOU HAVE THE BEST WELFARE PLAN OF ANY LABOR UNION IN THE COUNTRY". Further, while none of Progressive Fund moneys were taken over by UMW (R. 364), Dupee, to dissuade the men from joining UMW, declared a reason UMW "would like to take over your Local Union is the fact that as of May 31, 1957, you had on hand in your Retirement Pension Fund $253,943.07 plus more than $3,000 in your Welfare Fund".

Dupee's letter declared employees "will not be forced to join a different union against your will"; Progressive

officers "will use all legal means to preserve . . . your job rights"; "No one can take these rights away from you by threats, coercion or otherwise"; and the "only way you can lose them is by joining another Union" (R. 752).

On July 10 Progressive held "a big crowd" meeting (R. 362), which Dupee chairmaned and, with Progressive attorneys (R. 252, 360, 542), explained "their rights were protected by the law" (R. 251), and "he was going to stick up for our rights" (R. 361). Employees were asked to sign a "so-called loyalty petition", drawn up by Progressive's attorney (R. 252, 361-2). In succeeding weeks Dupee opposed UMW's campaign (R. 253); UMW cards were picked up at Progressive's instance (R. 547); and Dupee, asked by employees "what to do with" UMW cards, told them, "I tore mine up", hoping that they would do the same (R. 275).

John Marchiando, a dissident speaker, charged Progressive had become "a company union", observing that although remarks were the mines were such good mines they "could not be closed down", Millstadt was one of Illinois' "most economical mines", and O'Fallon had a 50¢ freight differential, yet Progressive consented to cut welfare payments from 40¢ to 20¢ (R. 542-3).

c. Events Concerning O'Fallon Employees.

McCollum meets with Local 75's Mine Committee on July 17 and 20

Paul Zempel, Peabody's assistant general counsel, brought to McCollum's attention the newspaper clipping of White's letter, and McCollum saw a newspaper copy of the Dupee letter (R. 442). Zempel cautioned him "to be careful . . . because the labor law does not permit us to take sides in these things" (R. 443). On July 5 or 6, Mc-

Collum "instructed our bosses" of the necessity of neutrality (R. 443-4). No evidence challenges this testimony.

The miners' vacation terminated July 8. O'Fallon, scheduled to reopen July 9, did not do so (R. 349). Delay, explained McCollum, was occasioned by bad air in the mine and permission to resume operation on July 22 (R. 357-8) was not given by the State Mine Inspector until July 20 (R. 448-9).

When the mine did not reopen July 9, Stanley Feist, Progressive's Local Union 75 president at the time, sought the reason. In a meeting on July 17 between company representatives and Local Union 75's mine committee, when Feist asked if the mine hadn't been shut down because of UMW's demand, McCollum showed the committee White's letter of July 10 pertaining to the contract (R. 353). It is undisputed McCollum told the group the company did not want to become involved in the organizing campaign (R. 360), it was "not allowed to take sides in this jurisdictional fight between the two unions" (R. 446), and "It is up to you fellows and whatever happens to this coal mine will have to be the decision of you men, you have your free choice to choose whichever union you want" (R. 446). However, it was the testimony of several witnesses, denied by McCollum (R. 457), that he stated in effect that Peabody had 29 mines and it would not run two under Progressive and have the 27 under UMW shut down (R. 353-4, 368, 372).

The meeting with McCollum was reported to the membership at the next meeting (R. 372).

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[15] When Local Union 1227, UMW, received its charter, Feist became its president.

Progressive's Local 75 appoints committee to meet with Company and UMW representatives.

On August 18, *at a Progressive's Local Union 75 meeting*, a special committee was picked to meet with the company and UMW because the men were "thinking about going United Mine Workers and we started getting some discussions and that was one of the ways to pick a committee and talk with the coal company" (R. 358). Committee instructions were to inquire "about welfare and working conditions and things of that nature" (R. 364). At an August 22 meeting, explaining it "had been appointed to represent the Progressive miners" (R. 453-4), the special committee asked if certain existing conditions would carry over if they voted UMW. McCollum stated operation was under a Progressive contract and a UMW contract could not be discussed (R. 454). Company representatives took no part in a Progressive-UMW discussion of pensions and welfare funds (R. 454). UMW's White stated UMW "would have nothing to do" with Progressive's moneys (R. 364). Progressive's committee, through Marchiando (R. 543-4), asked McCollum to secure a list of pensioners on the Progressive payroll and turn it over to UMW's White for computation purposes "if he took over these pensions" (R. 454, 294-5). McCollum complied (R. 456).

Progressive Local 75 conducts a secret election and votes to affiliate with UMW.

At Progressive's Local 75 meeting September 22, a committee was appointed to hold a secret ballot (R. 364) to decide whether "To remain" Progressive or "To join" UMW (R. 365). Progressive Local 75 had the ballots printed and paid therefor (R. 365). The election, held

on company property, as all other elections, from 6 a.m. to 6 p.m., so all three shifts could vote, was conducted by regular union tellers (R. 365-6)."[16] 288 employees voted for UMW and 47 for Progressive (R. 367).

d. Events Concerning the Millstadt Employees

Schroder meets with the repair crew on July 12.

Millstadt was not scheduled to reopen until July 15 because of repairs scheduled prior to the vacation's start (R. 298). The repair crew finished July 12, and during the repair work period, the crew "worked Saturday and Sunday of the first week" (R. 298-9).

Hartman, in charge of Millstadt, was advised by Zempel to be neutral in the dispute between UMW and Progressive and "it was up to the employees" (R. 379). Hartman so advised Fred Schroder, Millstadt's superintendent, and instructed him "to tell all the bosses to stay out of it" (R. 379-80).

Early on July 12, Hartman inquired concerning the amount of coal in the stockpile and how business was at Millstadt (R. 426). Later, Hartman advised Schroder he did not think "we should run the mine Monday" and "to inform the men" thereof (R. 426).

Two witnesses attributed to Schroder the statement on July 12 that the "company could not operate two mines and shut 29 mines down" (R. 320, 333). Schroder declared he stated a rumor "prevalent in the whole area" was Peabody would not operate two mines if the remainder of their mines would be forced to close (R. 429).

[16] The manner of conducting the election appears in R. 366-7.

In a meeting between Hartman and Schroder and Local 167's mine committee on July 13 and 17, Hartman advised the committee that suspension of work was "temporary . . . because of our stockpile and these slow orders" (R. 381). It is undisputed Hartman told the committee "we can't get mixed up in" the dispute between the two unions and that "we were in the middle" (R. 381, 431), and Hartman refused to comment on an employee's statement the mine would not work unless employees joined UMW (R. 321, 327). Millstadt resumed operations on July 20.

Progressive Local 167 requests, and has, a meeting with UMW and the Company on September 12.

Another meeting between Hartman and Schroder, a Progressive committee, and UMW representatives was held about September 12, 1957 (R. 397-9) on request of the Progressive Local (R. 398). Hartman and White, asked if Dupee would have a job under UMW, each gave an affirmative reply (R. 399). When discussion turned to contract questions, Hartman and Schroder left (R. 399-400).

All Millstadt employees designate UMW.

On September 18, when Progressive Local 167 held a meeting, 52 of Millstadt's 72 employees had signed UMW authorization cards (R. 888). Twenty employees (R. 549) who had not signed,[11] met following the local meeting. Knowing the other employees had already signed UMW cards (R. 313), they signed and turned them over to employee Alvin Bosse for delivery to UMW (R. 310-11). Witness Girardi, who testified Schroder's alleged

[11] One UMW card is undated (R. 890), but witness Harold Pruessing testified there were 20 in the group (R. 549).

statement of July 12 had nothing to do with his joining UMW, explained he joined because, as the youngest employee, he "let the majority rule" (R. 317-8).

3. Management Checks and Counts the UMW Cards and Recognizes UMW.

UMW continued, until September (R. 273-4), to distribute membership cards. In August, a second letter was sent by White to employees. Employees returned signed cards to the District office (R. 879, 888). By July 31 at O'Fallon and by August 4 at Millstadt, more than a majority of employees had selected UMW (R. 879, 888).

Zempel checked the cards against payroll lists between September 27 and October 1, and had them photostated. Just prior to October 1, Zempel read in newspapers about the O'Fallon vote and "some kind of an action taken at" Millstadt (R. 553).

No separate agreement was executed (R. 298). Zempel explained, when it was thus demonstrated UMW was designated, he advised McCollum and Hartman he had checked the cards against payroll lists and they "were 100 per cent" at Millstadt and the same at O'Fallon, except for five or six (R. 554), and the "green book" (R. 699) was automatically applied (R. 289, 552-3). On October 1, UMW's Local 1227 was chartered at O'Fallon. The next day Local 1229 was installed at Millstadt (R. 537).

On and after October 1, checkoff authorization cards were signed by employees and submitted to the companies (R. 524).

4. UMW Membership is Not a Condition of Employment.

UMW membership is not an employment condition at O'Fallon or Millstadt; and in the transition from Progressive to UMW, no employee lost his job (R. 402-3, 458-9).

5. The July 19 Notice of Termination of Progressive's Contract.

On July 19, Midwest and Perry sent letters to Coal Producers advising of the companies' membership withdrawal and revocation of its authority to negotiate extension of Progressive's contract "terminable on or after September 30, 1957" (R. 679, 680). Progressive's contract required a 60-day termination notice, so, on the same day, letters were dispatched by Midwest and Perry to Progressive Locals 75 and 167, enclosing copies of letters sent to Coal Producers and notifying Locals of the companies' notice to terminate the Progressive contract effective midnight September 30, 1957 (R. 681, 682.)[18]

The letter to Local 75 was received by its president, Stanley Feist, who did not read it at the Local's next meeting because president Dupee requested it not be done to afford an opportunity to check its legality (R. 363). It was read at the Local meeting, held August 4 (R. 364).

While these letters were signed by company vice-presidents, Zembel was in charge of sending them and sent them because the companies had been made aware of UMW's representation claim; they knew Progressive contracts required 60-day termination notice, and "it is common practice that when you want to negotiate a new

[18] Under date of July 13, Hartman and O'Fallon's mine superintendent, Joseph Johnson, resigned as executive board members of Coal Producers (R. 407-8, 721).

[19] On August 4, of the 323 employees at O'Fallon, 176 had designated UMW (R. 879).

contract that you serve notice of termination of the old one"; and it was his opinion that termination notice would place the companies "in a position to deal with whichever union could prove to us that they represented the men for purpose of collective bargaining" (R. 551-2).

Not until August 3 did Progressive reply (R. 687-92). Dupee asserted the companies had not complied with the contract's terms and that "this contract will not terminate on September 30, 1957, as per your notice, although it may require a determination by a court of law as to which contention is correct". Dupee requested a meeting "with the proper representatives of your company" to negotiate a new contract "between now and August 15". Zempel explained he did not reply either to Dupee's letter or to White's July 10 letter (R. 717) because he was aware of the two unions' contentions and did not want to answer either "until we could be fully advised as to which union actually represented the men" (R. 550-1).

REASONS FOR GRANTING THE WRIT

I.

The duty and necessity of federal Courts of Appeals of conforming to that standard of reviewing National Labor Relations Board's findings, which Congress provided in the Act's Section 10(e) and (f), was expressly enunciated in this court's *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474. Therein (p. 488), it said that, "substantiality of evidence must take into account whatever in the record fairly detracts from" the weight of Board's findings. Federal appeals courts, including the Seventh Circuit, have heretofore pointed to the standard commanded by *Universal Camera* (p. 488) to base their refusals to enforce Board findings because evidence supporting a Board decision did not approach substantiality "*when viewed in*

the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view" Miller Elec. Mfg. Co., Inc. v. *NLRB*, 7 Cir., 265 F. 2d 225. *Farmers Co-Operative Co.* v. *NLRB*, 8 Cir., 208 F. 2d 296. *NLRB* v. *Rockwell Mfg. Co.*, 3 Cir., 261 F. 2d 109, 115.

Though no employee complained he had been coerced or restrained, and employees had designated by cards their choice of UMW and, at O'Fallon, had voted 288 to 47 in a secret ballot election in favor of UMW, and the Seventh Circuit's opinion specifically so stated, yet that Court has approved Board findings that UMW did not represent an uncoerced majority when Peabody and Unions entered into the agreement on or about October 1, 1957—an agreement whose provisions the Seventh Circuit held to be valid. This, in turn, the Board predicated upon its finding that Peabody unlawfully assisted UMW in its organizational activities; and as a result of the Seventh Circuit's approval of such finding it has decreed that Peabody shall not recognize UMW as the employees' bargaining representative, absent a Board election, and has commanded that neither Peabody nor Unions give effect to the bargaining agreement which, as noted, the Seventh Circuit held to be valid (A. 13a-17a). In the Seventh Circuit Unions complained, as they now do, that Board's findings and conclusions were reached by ignoring vital and undisputed evidence clearly challenging Board's views. The Seventh Circuit, likewise disregarded such evidentiary data, which has resulted in a portion of its opinion being clearly in error and this, in turn, is reflected in its erroneous decree of April 5, 1961, enforcing Board's order, in part, instead of denying enforcement completely.

By its failure to implement the congressional standard, contrary to its mandated obligation, the Seventh Circuit

has rendered nugatory and void employees' designation of UMW as their bargaining representative without employee complaint of Union coercion, restraint or discrimination; it has deprived Unions of their rights to represent such employees and to be recognized by Peabody as the employees' bargaining agency; and it has denied to both the employees and Unions the fruits of collective bargaining mirrored by the agreement which the Seventh Circuit has decreed, though lawful, shall not be given effect.

Although Unions, in the Seventh Circuit, complained that Board and its Examiner alike had ignored *vital, undisputed evidentiary data* which conflicted with and challenged Board's findings, *and this complaint was not challenged by Board,* nothing in the Seventh Circuit's opinion deals therewith. Thus, the cases' present posture is one wherein "the body of evidence opposed to the Board's view" has been ignored by the Examiner, Board and the Seventh Circuit. Since the instant cases present a federal question which has been decided in a way in conflict with the congressional standard of review, this Court should award the writ sought herein. In *Universal Camera* this Court avowed its intervention available when an appellate court has so misapplied that standard of review.

The following discussion makes manifest that the Seventh Circuit has misapplied such standard:

UMW's organizational campaign was not a joint enterprise between UMW, District and Peabody. Examiner conceded (R. 39), and Board agreed (R. 54), that no UMW "official asked or demanded of any Peabody official that the mines be closed or that contributions be halted". It is undisputed, too, that company representatives advised UMW's White that UMW recognition depended

upon termination of Progressive's contract, designation of UMW by employees, and UMW's compliance with legal requirements.

Undisputed and corroborated evidence shows that O'Fallon had an unsafe, unsolved air problem which delayed its reopening on July 19, following the vacation period, until July 22; when a State Mine Department representative approved resumption of operations. At his July 17 meeting with the employee committee, McCollum stated the reason for O'Fallon's shutdown was "bad air at the mine" (R. 352). Even a committee member admitted "the air was bad around the bottom" before the vacation began. He knew the company had been making ventilation changes to improve the air (R. 357) and a posted Federal Inspector's report complained of the air's condition and "that's the reason the company was working on it" (R. 362-3), and that McCollum told the group the mine would reopen July 22, if air samples "tested out all right" (R. 357-8). McCollum agreed, as the committee requested, to keep it advised "when the mine would open" (R. 448), and it was hoped that "by Friday or Saturday [July 19 or 20] to have a sample that would pass" (R. 448). On Friday, a sample analyzed by the State resulted in the State Mine Inspector's giving permission to resume work (R. 449). McCollum, on July 20, so advised the men (R. 449), and operation resumed July 22 (R. 356-7).

Although O'Fallon resumed work July 22 and nothing shows the reason for such closing and resumption were other than that which McCollum claimed, Board found O'Fallon was closed "to lend the employer's substantial support and assistance to" UMW's organizational campaign (R. 27). The undisputed fact remains the com-

pany did have an unsafe, unsolved air problem until July 19.

Likewise, though Millstadt was scheduled to reopen July 15 (R. 395), on July 12 Hartman, because of coal on hand and lack of business, advised superintendent Schroder to tell the men the mine would not reopen.

The Seventh Circuit, in its opinion (284 F. 2d 913), noting that Board and its Examiner "relied to considerable extent upon statements made by vice president McCollum, general superintendent Hartman, and mine superintendent Schroder, to the effect that the mines would not reopen and operate unless UMW was designated as bargaining representative by the employees" and "These officers denied making many of the statements relied upon", declared it could not "disturb credibility resolutions made by" Board and "The weight to be attached to and the credibility to be accorded testimony is a matter for the trier of the facts" (284 F. 2d 913; A. 5a).

Actually, Board, like its Examiner, had credited committee members' statements that McCollum said Peabody had 29 mines and it would not run two under Progressive and have the 27 under UMW shut down; and while Unions challenged the justification for such credit of testimony, neither Board nor Examiner considered the *undisputed* testimony that at the same meeting McCollum stated that O'Fallon "would work when some of the other Peabody mines were not working" (R. 371), and *the company "had to be careful"* and *"they didn't want to get involved"* in the UMW organizing campaign (R. 360-1). They *ignored* the undisputed testimony that McCollum and Hartman had been cautioned not to get involved in the organizing activities; they *ignored* McCollum's unchallenged testimony he would decline to answer

controversial questions "*because we were not allowed to take sides in this jurisdictional fight between the two unions*" (R. 446); that while the employees were having troubles, the company was having its troubles too, showing the committee White's July 10 letter (R. 717) that "Full compliance to the terms" of the contract "is expected" from Peabody (R. 447-8); that Peabody had acquired the two mines under Progressive's jurisdiction; and that it was not known how the conflict would be resolved, but "*it is not up to me. It is up to you fellows and whatever happens to this coal mine will have to be the decision of you men, you have your free choice to choose whichever union you want*" (R. 446).

Without witness contradiction to McCollum's testimony that an employee suggested the company cancel Progressive's contract and thus afford employees freedom by election to choose "whichever union they wanted", to which McCollum replied he would refer it to the legal department (R. 447), which was done (R. 456-7), was rejected by Examiner, who declared this "extravagant claim" deprives his entire testimony of credibility (R. 25), thus indulging in surmise rather than factual predicate and disregarding the rule that mere rejection of evidence as false "does not take the place of affirmative evidence." *Hazel-Atlas Glass Co.* v. *NLRB*, 4 Cir., 127 F. 2d 109, 114-5. A fact-finding agency is not at liberty "under the guise of passing upon the credibility of a witness, to disregard his testimony when from no reasonable point of view is it open to doubt" and such officer "should not needlessly impute perjury to a witness": 58 Am. Jur., Witnesses, Section 864, pp. 492-3.

The Seventh Circuit, in *Chicago Rawhide Mfg. Co.* v. *NLRB*, 7 Cir., 221 F. 2d 165, 167, told the Board, contrary to its decision and decree herein, that

> "Words and actions which might dominate the employees in their choice of a bargaining agent do not constitute domination prescribed by the Act unless the employees are *actually dominated* . . ."

Accord: *NLRB* v. *Englander Co.*, 9 Cir., 260 F. 2d 67, 76. Yet, it *disregarded* the significative circumstances that *not a single employee who signed UMW cards asserted compulsion or coercion and that UMW status as a freely chosen agency could have been mirrored in no more positive manner than the O'Fallon employees' voting 283 to 47 in UMW's favor in the secret-ballot election.*

Another pertinent factor which the Seventh Circuit, Board and Examiner alike *failed to consider*, is that although there were "perhaps 20" persons in supervisory capacity at O'Fallon, *a single instance by a single company representative* is employed to predicate company assistance at O'Fallon to UMW. Clearly, had it been company policy and pattern to assist UMW unlawfully, thorough Board investigation disclosed by the record would have been productive of proof portraying such policy and pattern. *Isolated incidents* have been rejected as predicates for unfair labor practices by both Board and the judiciary. *Hot Point Co.*, 120 NLRB 1768; *Sunset Lumber Products*, 113 NLRB 1172; *NLRB* v. *Grunwald-Marx, Inc.*, 9 Cir., 47 LRRM 2940 (April 3, 1961).

Millstadt, as noted (*ante*, p. 20-1), scheduled to reopen July 15, did not do so for economic reasons. Hartman advised Millstadt's mine committee that suspension was "temporary . . . because of our stockpile and these slow orders" (R. 381, 412). Board approved its Examiner's findings that Millstadt's superintendent Schroder and Hartman had stated that the company could not operate two mines and shut 29 mines down (R. 300); and Examiner relied upon Schroder's answer (R. 20) that he did

say the company would not operate two mines and shut 29 down, but Examiner *ignored* his next answer that Schroder's full testimony was that he told the men that "you have been hearing the same kind of talk I have, that if you had 30 mines would you run two, if you expected the other 28 mines to be closed down", and that "was the rumor that I had heard, it had been repeated to me a dozen times, I expect, in the week that I was not at work." (R. 428). *Such rumor discussions, the record discloses, had taken place at Progressive's union hall a number of days prior to Schroder's statement.* There is no evidence that the rumors were inspired, circulated or adopted by unions or the employers. Pertinently, one witness testified that Schroder's statement did not prompt him to do anything with respect to his union membership (R. 317); and there is no employee witness who testified that the statement prompted his signing a UMW card.

Evidence of the July 13 meeting between Hartman and Schroder and the Millstadt mine committee is replete with pit committeemen's admissions of company neutrality, which have been *ignored*. Had it been Hartman's purpose to coerce employees in their choice of UMW, would he have answered, when asked by committeeman Kreitner if the mine would work if the employees joined UMW, "Frankly, I won't comment on that" (R. 321, 325)? Hartman, asked by the committee if Progressive president Dupee could work at Millstadt, responded that he could "under any union if he wanted to" (R. 396), and that UMW's White "doesn't have anything to say about who we put on here, who we hire here at this mine". When a committeeman stated that if the men quit as Progressives, "we are coming back to work as Progressives", Hartman answered, "*that's up to you men. The majority rules here*" (R. 396), and when another committeeman

reminded Hartman the company had a Progressive contract, Hartman replied "Yes, sir, we intend to live up to it (R. 397).

Moreover, since the Seventh Circuit, like Board and Examiner, based its conclusion of unlawful assistance to UMW upon the statements that Peabody would not operate two mines and have 27 mines shut down, such Court preference for Board's findings would not suffice to vitiate UMW's selection as the bargaining agent since the mines' closing would depend not upon company conduct, but upon UMW's shutting down the other 27 mines. *There is no evidence that UMW threatened it would close the 27 mines in the event employees continued Progressive as bargaining agent.* In fact, White's denial (R. 285) that he had told Peabody officials he would do so stands unchallenged. Heretofore, Board has held that prediction of future events beyond a speaker's control are mere expressions of opinion and protected by the Act's Section 8(c). *A. L. Gilbert Co.*, 110 NLRB 2067, 2073; *Sunset Lumber Products*, 113 NLRB 1172, 1173; *Tetrad Co., Inc.*, 125 NLRB 466, 45 LRRM 1152. Where supervisors stated, "It would be 'advisable' to sign AFL cards and that they did not want CIO in the plant", the First Circuit reversed a Board conclusion of unfair labor practice because it disbelieved such verbal pressure constituted "threats of reprisal or force or promises of benefit". *NLRB* v. *Corning Glass Works*, 1 Cir., 204 F. 2d 422, 424, 427.

Likewise ignored by Board, its Examiner and the Seventh Circuit is the principle that "an unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives the record taken as a whole must present a substantial basis of believable evidence

pointing toward the unlawful one." *NLRB* v. *McGahey*, 5 Cir., 233 F. 2d 406, 413.

Ignored is Progessive's counter campaign and its avowals that employees would not be deprived of their rights. Ignored also are events following the purported McCollum and Hartman statements: meetings with UMW representatives proposed at Progressive meetings; the O'Fallon election; and the cards designating UMW as bargaining agent.

Though no contention is made the employee-signed authorization cards are not authentic, Board regarded them as irrelevant. Both Board and the Seventh Circuit ignored decisional law that card-designation is a method of proving employee choice of a bargaining agent. *UMWA* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62; *NLRB* v. *Indianapolis Newspapers, Inc.*, 7 Cir., 210 F. 2d 501; *NLRB* v. *Parma Water Lifter Co.*, 9 Cir., 211 F. 2d 258, 261. Undisputable proof having been presented, the Act imposed on Peabody a duty to recognize UMW, and Board certification, contrary to the Seventh Circuit's decree, is not requisite.

A final factor which completely militates against the Seventh Circuit's sanction of Board's finding of unlawful assistance by Peabody to UMW is the undisputed evidence that the production at Millstadt and O'Fallon was 1,900,000 tons annually (R. 400, 458); there was a differential of 20¢ per ton in requirement of welfare payments in UMW's contract and that of Progressive which required company payments of approximately $380,000.00 more per year under the UMW contract than was required under Progressive's contract. *Employer preference for UMW at this high cost would be unreasonable and unrealistic.*

Board's Examiner found the furnishing of the mailing lists to UMW *did not* "constitute unlawful assistance"; but Board found, since Peabody assisted UMW "by numerous other acts", furnishing of mailing lists "in this context" constituted unlawful assistance (R. 54.) The uncontradicted evidence (R. 422, 484-5) is that there is nothing unusual in the company's giving employee lists to various organizations. Further, the lists were incomplete and contained approximately 100 incorrect addresses (R. 290). *Morganton Full Fashioned Hosiery Co.*, 107 NLRB 1534, and *The DeVilbiss Co.*, 115 NLRB 1164, are Board professions that list furnishing is not unlawful assistance. The Seventh Circuit admitted that list furnishing by itself would be no basis for the Board's conclusion and that even considered with other acts of assistance, "it is a slender reed on which the Board in part rests its decision" (284 F. 2d 914; A. 5a-6a)

Under applicable law, and the substantial evidence on the record considered as a whole, it is readily apparent that the Seventh Circuit improperly approved Board's erroneous findings and conclusions that employers interfered with, restrained and coerced employees at the two mines in the exercise of their Section 7 rights and illegally assisted UMW in the employees' dsignation of that organization and that UMW did not represent an uncoerced majority of employees in October, 1957. Language in *NLRB* v. *Roberts Bros., Inc.*, 9 Cir., 225 F. 2d 58, 60, is apt

> "Some twenty years ago . . . employees might well . . . have been swayed one way or another by an employer's statement as to his position on the subject. Now, labor and industry speaks with equal dignity and it requires something more than mere suspicion to read coercion into an employer's speech which, upon its face, is in all respects within the proprieties. We think it is no longer proper

to assume that the American employee is a craven individual afraid to stand up and express himself freely on the subject of his own welfare."

The uniformity with which Examiner and Board rejected testimony of witnesses favorable to petitioners' contentions and in wittingly refusing to consider relevant, unchallenged factual data suffices to render Board's findings and conclusions as suspect and to "destroy the presumption of correctness usually attributed to the findings of the trier of facts." *Local No. 3, United Packinghouse Workers of America, CIO* v. *NLRB*, 8 Cir., 210 F. 2d 325, 330. Likewise, it demonstrates clearly the necessity for the granting of the writ sought herein.

II.

Though the Seventh Circuit's opinion specifically recites "No employee claims his rights under Section 7 were violated", that "no employee at either mine lost his job", that "Membership in UMW was not a condition of employment" and "An employee did not need to belong to UMW to retain his employment" (284 F. 2d 914; A. 7a), and again "there are no findings of actual coercion in the instant case nor any evidence which would have supported such findings" (284 F. 2d 916; A. 10a), yet the Seventh Circuit's decree (A. 13-20a) not only orders Unions to cease giving effect to the agreement with Peabody at the two mines, *but it commands that they cease and desist from restraining or coercing the employees at the two mines* "in the right to select or not to select" Unions as their bargaining representative. The Seventh Circuit's opinion *fails completely* to explain the predicate for its command that Unions cease restraining and coercing the employees as aforesaid, which is totally inconsonant with the language in the Seventh Circuit's opinion that "there are no findings of actual coercion in the instant case nor

any evidence which would have supported such findings" (284 F. 2d 916; A. 10a). Thus, no basis exists in the Court's opinion for any provision in the decree predicated upon coercion or restraint.

While the language last quoted from the Court's opinion is a portion of a sentence dealing with reimbursing dues, it does not stand alone; and such language treated conjointly with the Court's further language that "No employee . . . complained of any coercion or discriminatory conduct", that "there is clear evidence in the record that membership in UMW was not a condition of employment", that "No employee claims his rights under Section 7 were violated", that "Furthermore in the transition from Progressive to UMW, no employee at either mine lost his job", that "Membership in UMW was not a condition of employment", and that "An employee did not need to belong to UMW to retain his employment" (284 F. 2d 911, 914, 916), fully demonstrates the Seventh Circuit's decree as it concerns Unions [paragraph a.(1) and (2); A. 16a,] is unwarranted and in conflict with the Seventh Circuit's findings and holdings expressed in its opinion.

The Seventh Circuit's decree, which is in total conflict with its avowals above recited, in practical effect, affirms Board's findings that UMW's letter, dated July 1, 1957, to employees of the two mines was coercive within Section 8(b)(1)(A)'s meaning because its "plain intent and reasonable effect" was that employees would be required as a condition of employment to become UMW members (R. 56), and that the 8(b)(1)(A) violation stemmed from curtailment of the employees' right to select their own representative, guaranteed in the Act's Section 7 (R. 56).

In the Seventh Circuit, Unions challenged such findings, as they do now. Here again, Board and its Examiner failed to give consideration to that "body of evidence opposed to the Board's view" (*Universal Camera Corp. v. NLRB*, 340 U. S. 474, 488), and this same vice attends the Seventh Circuit's decree in paragraph a.(1) and (2) as it relates to Unions.

That the Seventh Circuit should have reversed and set aside the Board's findings and conclusions that Unions violated Section 8(b)(1)(A) is made clear by the following discussion:

White's letter to the employees and the newspaper ads are discussed herein (*ante*, p. 14). The letter was couched in *words of persuasion*. It stated UMW was "*requesting*" employees to become members and District and UMW "extend a cordial invitation" to affiliate with UMW and participate in outlined benefits. Had its purpose been to coerce, would UMW have waived, as the letter stated, the requirement of initiation fees? That such waiver is "promotional persuasion" and "does not smack of coercion" is the Seventh Circuit's holding in *NLRB* v. *Taitel*, 7 Cir., 271 F. 2 ' 1.[20] Had there been attendant compulsion, there would have been no reason to include therein the benefits derivative from UMW membership nor necessity for District's solicitation of employees. Pertinently, neither Board nor Examnier mentioned White's use of benefits as a persuasive attempt to convince employees. Instead, both assiduously avoided discussing the

[20] The United States Supreme Court in *NLRB* v. *Drivers etc. Local Union*, 362 U. S. 274, 287, quotes Senator Taft, in the Taft-Hartley debates saying:

"'It seems to me very clear that so long as a union-organizing drive is conducted by persuasion, by propaganda, so long as it has every legitimate purpose, the Board cannot in any way interfere with it. * * *' 93 Cong. Rec. 4434."

letter's contents, Examiner stating, "For purposes of brevity, certain paragraphs relating to numerous benefits . . . *are omitted*" (R. 15). No witness challenged the mechanics and persuasion employed in the campaign (see *ante*, p. 15) or contradicted White's testimony of employees' favorable response in sending in UMW authorization cards (R. 879-90). Contention of UMW coercion is further beclouded by John Marchiando's testimony that hearing of UMW's membership campaign, he phoned White "it was about time for" UMW to "try to organize that mine" (R. 540). *No employee testified he was coerced or restrained.*

Other facts militate against assertion of UMW coercion.

At *Progressive* Locals' meetings,, committees were appointed to confer with UMW representatives, (*ante*, p. 19-21). *Such meetings were held, not at UMW or District's request, but by Progressive Locals* (R. 398) because the men were "thinking about going" UMW and committeemen were instructed to inquire "about welfare and working conditions" (R. 358, 364). At O'Fallon, when the committee was appointed August 18, 289 of 323 employees had designated UMW (R. 879). At Millstadt, the committee appointment was made September 12, when 51 of the 72 employees had designated UMW (R. 888).

At O'Fallon, in a Progressive Local-sponsored secret-ballot election (R. 364-5), employees voted 288 to 47 in UMW's favor (R. 367).

At Millstadt's Local 167, the September 12 number of 51 was increased to 52 on September 18, when, following a Local meeting, the remaining employees who had not signed UMW cards met and executed UMW cards because the other employees had designated UMW (R. 313). No record data points to Union conduct that such reason was

prompted by union coercive conduct. The uncontradicted evidence shows that employee inquiry whether Dupee (Progressive's president) would have a job under UMW brought White's affirmative response (R. 399).

Progressive's counter-campaign to fend off UMW's persuasions for membership has been depicted (*ante*, p. 16). Despite Progressive's repetitive assurances of its protectorate and that employees would "not be forced to join" UMW and "No one can take these [job] rights away from you by threats, coercion or otherwise" (R. 752), the loyalty petitions and resolutions, and other Progressive activities, employees chose UMW . The campaign for employee choice, it must be recalled, was a continuing process over a period of four months' duration.

In the Seventh Circuit, Board's brief (p. 38) swept aside the competing campaigns with a simple assertion that "it is idle to stress" them, and though Board, in *Parma Water Lifter Co.*, 102 NLRB 198, 207, emphasized the importance of employee expression of choice at an election, in the instant case, of the employees choice by designation and vote it glibly said, "It is similarly without significance"; but Board went no further to explain why it was idle to stress the campaigns and why employee choice by designation and vote was without significance.

The instant picture is without even "threadbare testimony" of Union coercion or restraint (*Miller Elec. Mfg. Co.* v. *NLRB*, 7 Cir., 265 F. 2d 225, 226), and the Seventh Circuit made it plain in the language above quoted that this was so.

Examiner noted (R. 17), with Board's agreement (R. 54), his unconcern with the "subjective effect upon individual employees which" the July 1 letter "may or may not have had"; he would (R. 17) avoid "speculation as to"

such subject effect; and his sole concern was whether "the text of that letter" was "of a nature which, under the circumstances, may reasonably be found to be 'coercive'" (R. 17) yet he *totally ignored* "the circumstances" reflecting employees voluntarily designated UMW. Where a Board finding of coercion is purely "legalistic", its findings have been rejected. *Building Material Teamsters* v. *NLRB*, 2 Cir., 275 F. 2d 909, 912; *Chicago Rawhide Mfg. Co.* v. *NLRB*, 7 Cir., 221 F. 2d 165.

Where such pertinent factual data is so wittingly ignored, it not only demonstrates clear error in Examiner's findings and conclusions, adopted by Board, but eminently establishes the necessity that the Seventh Circuit should have rejected them.

The foregoing makes clear that the Seventh Circuit should have reversed Board's holding that Unions violated Section 8(b)(1)(A) by reason of the letter of July 1, the newspaper ads, and that employees were curtailed in selecting their bargaining representative. It further demonstrates plainly that not only is the Seventh Circuit's requirements ofparagraph a(1) and (2) of its decree as it relates to Unions [A. 16a] not supported by the substantial evidence on the record considered as a whole, but it is in total conflict with positive recitals of non-coercion in the Seventh Circuit's opinion. It conflicts, too, with *Miller Electric, Farmers Co-Operative*, and *Rockwell Manufacturing, all supra* (*ante* p. 25), as well as with *Universal Camera* which points to the necessity and propriety of granting of the writ as to this issue. There is thus presented a federal question which has been decided in a way at variance with the congressional standard of review expressed in the Act's Section 10(e) and (f) [29 USCA 160(e), (f)].

CONCLUSION

For the foregoing reasons, petitioners, and each of them, assert that the Seventh Circuit's decision of December 2, 1960, are erroneous in their failure to deny totally the enforcement of Board's order; and that said decree of April 5, 1961, in all of its requirements, both as to Peabody and as to Unions, as such requirements affect Unions, is erroneous; and therefore petitioners, and each of them, pray that this petition for writ of certiorari should be granted and that a writ of certiorari issue to review the decision and orders, judgments and decrees of the Seventh Circuit, entered in said Cases Nos. 12889 and 12915 on December 2, 1960, and April 5, 1961, as they adversely affect Unions.

MOTION TO DEFER CONSIDERATION OF PETITION

Now come Petitioners, United Mine Workers of America, District 12, United Mine Workers of America, Local Union 1227 and Local Union 1229, both of United Mine Workers of America, and each of them, by counsel, and move this Honorable Court to defer consideration of the within petition for certiorari for the following reasons:

1. National Labor Relations Board has filed with the Seventh Circuit, and there is currently pending therein, a document styled "Petition for Clarification or Modification", wherein Board requests the Seventh Circuit "to amend its opinion of December 2, 1960, to set forth its ground for setting aside the provisions of the Board's order relating to the company's obligation to bargain with Progressive Mine Workers." In said Petition, Board asserts the necessity therefor "If the Board should seek Supreme Court review of the adverse portions of the decree relating to bargaining", and that apart from the question

of such review, Board would welcome the Seventh Circuit's guidance in explaining the Court's disagreement with the Board's determination on the bargaining issue, as set out in the decree.

2. Should the Board seek such review following the Seventh Circuit's action on the pending petition, consideration of the instant petition for certiorari conjointly with that of the Board would serve to present a clearer and more complete picture of the various issues presented in the consolidated cases before the Seventh Circuit than a consideration of each petition separately.

Respectively submitted,

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APPENDIX

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

SEPTEMBER TERM AND SESSION, 1960

No. 12889
PERRY COAL COMPANY and
PEABODY COAL COMPANY, ET AL.,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 12915
UNITED MINE WORKERS OF AMERICA, ET AL.,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Set Aside and on Cross-Petition to Enforce a Decision and Order of The National Labor Relations Board.

December 2, 1960

Before DUFFY and SCHNACKENBERG, *Circuit Judges*, and MERCER, *District Judge*.

DUFFY, *Circuit Judge*. Appeal No. 12889 is before this Court upon the petition of Peabody Coal Company (Peabody) to review and set aside an order of The National Labor Relations Board issued against Peabody and also against the petitioners in appeal No. 12915.

125 N.L.R.B. No. 110 (Dec. 30, 1959).

Appeal No. 12915 is before the Court upon petition of the United Mine Workers of America, its District 12, and its Local Unions 1227 and 1229, to review and set aside the same order of the Board. In its answer which applies to both appeals, the Board has requested enforcement of its order.

The charging party is the Progressive Mine Workers of America. Among the sections of the Labor Management Relations Act claimed to have been violated are: Sections 8(a)(1) 8(a)(2); 8(a)(3); 8(a)(5); 8(b)(1)(A) and 8(b)(2).

No employee of either of the coal mines hereinafter described complained of any coercion or discriminatory conduct. Fundamentally, this is a struggle between the Progressive Mine Workers of America (Progressive) and the United Mine Workers of America (UMW) with the employer, Peabody, being more or less in the middle.

For many years prior to the summer of 1957, Progressive and its Local 167, represented employees of Midwest-Radiant Corporation (Midwest) at the Millstadt mine, and Progressive and its Local 75 represented employees of Perry Coal Company (Perry) at the O'Fallon mine. This representation was accomplished by means of labor agreements between Progressive and its Locals 167 and 75 and Coal Producers Association of Illinois of which Perry and Midwest were members.

For many years prior to the summer of 1957, Peabody, as a member of the Illinois Coal Operators Association, had recognized UMW as the exclusive bargaining representative at twenty-seven other mines which it owned and operated in Illinois and other parts of the country. The collective bargaining agreement included the National Bituminous Coal Wage Agreement of 1950 as amended, and the Wage Agreement and Working Conditions of District No. 12.

The 1952 amendment provided that the Agreement covers the operation of all of the coal lands owned or held under lease by the coal operators, or acquired during the term of the contract. This amendment was carried forward and preserved by the 1956 amendment which provided that the Agreement covered all of the bituminous coal mines owned or operated by the coal operators who were parties to the agreement.

Through a process of liquidation and merger occurring about October 3, 1957, the properties of Perry and Midwest became the properties of Peabody. The only employer now involved in these proceedings is Peabody.

In May or June, 1957, which was after Peabody acquired control of the Millstadt and O'Fallon mines, Hugh White, president of UMW's District 12, notified Hartman, general mine superintendent of Peabody, and McCollum, a vice president of Peabody and formerly a vice president of Perry, that Peabody must comply with the provisions in the National Bituminous Coal Wage Agreement by recognizing UMW and applying the terms of the contract at the Millstadt and O'Fallon mines. His demand was not based upon a claim that District 12 represented any of the employees at these mines.

McCollum and Hartman agreed the contract applied to all Peabody operations, and stated that they would apply the contract as a matter of course when their contract with Progressive expired, and when UMW could show that it represented a majority of the employees.

In May or June, 1957, White obtained from Hartman a list of the names and addresses of the employees of the Millstadt mine, and obtained from McCollum a similar list of the employees at the O'Fallon mine. Both Hartman and McCollum knew UMW planned to attempt to organize the employees of the two mines. Hartman testified that such lists which were partially incorrect, had been previously furnished to charity organizations, manufacturers' representatives, insurance men and others.

On July 1, 1957, White sent letters to all employees at both mines. At this time the mines were closed down for the annual vacation period. The letters recited that UMW had served notice on Peabody that it must comply with the provisions in the National Bituminous Coal Wage Agreement, and that all provisions of that contract be applied at the Millstadt and O'Fallon mines. It invited all employees to become members of UMW, and enclosed a membership card upon which it requested the signature of the person addressed.

On July 4, 1957, Roy Dupee, president of Progressive's Dis-

trict No. 1, wrote Peabody, cautioning it to comply with the Progressive agreement and the wishes of "your employees as to Union affiliation." Peabody did not reply to Dupee's letter. Dupee made numerous telephone calls to Peabody at St. Louis to ascertain the company's position concerning the demand of UMW. No one in authority would or did answer.

The annual vacation period at both mines was scheduled from June 28 to and including July 8. However, at Millstadt certain repair work was in progress, and the opening date there was re-scheduled to July 15th. The mine did reopen on July 20th. O'Fallon was reopened on July 22nd.

While the mines were closed, Peabody withdrew from the Coal Producers Association of Illinois, and also gave notice to Progressive that it would terminate the contract between them on September 30, 1957. On August 4, 1957, Dupee wrote Peabody protesting Peabody's contemplated termination of the agreement, and requested Peabody to meet with Progressive as the employees' bargaining representative to negotiate a new agreement. Peabody did not respond to this request to bargain. On September 30, 1957, Peabody terminated its contract with Progressive and ceased making payments to the Progressive Welfare and Retirement Fund. On October 1, 1957, Peabody recognized UMW and applied the UMW contract at the Millstadt and O'Fallon mines.

The Board adopted substantially all of the trial examiner's conclusions and recommendations. The Board found Peabody violated Section 8(a)(2) and (1) by assisting and supporting UMW, a) by furnishing UMW with lists of its employees at the two mines; b) by discriminatorily locking out employees at Millstadt from July 15 to July 20, 1957, and at the O'Fallon mine from July 9 to July 20, 1957, in order to encourage membership in UMW; c) during the periods of lockouts, threatening employees with continued lockout; d) by refusing to bargain with Progressive; e) by terminating the bargaining agreement with Progressive on September 30, f) by discontinuing payments to Progressive's Welfare and Retirement Fund on September 30; g) by entering into an exclusive bargaining contract with UMW at a time when that Union did not represent an uncoerced majority of employees, and h) by entering into a con-

tract containing illegal closed shop provisions. The Board also found the conduct of Peabody violated Section 8(a)(3) and (5) of the Act.

The Board found and determined UMW violated Section 8(b)(1)(A) and (2) of the Act by demanding Peabody enter into a collective bargaining agreement with it; by its letter of July 1, 1957, addressed to each employee of the two mines, and by its newspaper ad addressed to mine employees stating UMW was requiring Peabody to apply the provisions of the UMW contract at the two mines and by entering into contracts containing illegal Union-security provisions.

Peabody claims and offered testimony tending to prove that the reopening of the Millstadt mine was delayed for economic reasons, and the reopening of the O'Fallon mine was delayed for safety reasons, but the trier of the facts found otherwise. The examiner and the Board relied to a considerable extent upon statements made by vice president McCollum, general superintendent Hartman, and mine superintendent Schroeder to the effect that the mines would not reopen and operate unless UMW was designated as bargaining representative by the employees.

True, these officers denied making many of the statements relied upon, but we cannot disturb credibility resolutions made by the Board. *NLRB* v. *Wagner Iron Works*, 7 Cir., 20 F.2d 126, 142. The weight to be attached to and the credibility to be accorded testimony is a matter for the trier of the facts. *Sunshine Biscuits, Inc.* v. *NLRB*, 7 Cir., 274 F.2d 738, 741.

The trial examiner found the furnishing of the mailing lists to UMW did not "constitute unlawful assistance to United and interference within the meaning of the Act. * * *" The Board disagreed. It did not say the furnishing of the lists was illegal *per se*, but that the furnishing of the lists in the context of other acts of assistance constituted illegal assistance, citing *Wagner Iron Works*, 104 N.L.R.B. 445, enforced, *NLRB* v. *Wagner Iron Works*, 7 Cir., 220 F.2d 126.

We think the furnishing of the lists by itself would be no basis for the conclusion of the Board. Even considered with

other acts of assistance, it is a slender reed on which the Board in part, rests its decision. Although of relatively small importance in this case, we are not disposed to interfere with the Board's decision as to the effect of furnishing the lists.

The National Bituminous Coal Wage Agreement of 1950 contains the following provision: "It is further agreed that as a condition of employment all employees shall be, or become members of the United Mine Workers of America, *to the extent and in the manner permitted by law.*" (Emphasis supplied)

An integral part of the same printed document which contains the above quoted provision is "Wage Agreement and Working Conditions between the Illinois Coal Operators Association and The International Union United Mine Workers of America and District No. 12, United Mine Workers of America." This agreement bears the effective date of April 1, 1941 and provides that it remains in full force and effect in its provisions "* * * except where they have been amended, modified and or nullified by the National Bituminous Coal Wage Agreements incorporated in this book."

The trial examiner found the requirement of UMW membership contained in the 1941 district agreement was an integral part of the UMW's National Bituminous Coal Wage Agreement and concluded that it provided for an unlawful closed shop. The Board agreed, but went further and held the Union security clause in the 1950 agreement provides for an unlawful closed shop in spite of the provision "* * * to the extent and in the manner provided by law." Such a holding is contrary to our decision in *Lewis* v. *Quality Coal Corporation*, 270 F.2d 140.

The Board seeks first to distinguish *Quality Coal* on the ground that that case involved private litigation. It then asks us to reconsider our decision in *Quality Coal*, and cites the same cases which this Court considered and rejected when it handed down the *Quality Coal* decision.

It is entirely immaterial that *Quality Coal* arose in the context of private litigation. The question that was fully litigated in that case was decided adversely to the present position of the Board.

We decline the cordial invitation of the Board to abandon our decision in *Lewis* v. *Quality Coal Corporation*. We adhere to that decision. For whatever significance it may have, it also is of interest to note that the United States Supreme Court denied certiorari in *Quality Coal*, 361 U.S. 929.

We are of the view and hold that the Board was in error in holding the 1941 agreement, which provided for a closed shop, was not amended or modified by the 1950 agreement. It seems clear that the contracting parties contemplated that changes might be necessary under the law, and evinced a desire to conform to such changes.

The intention of the parties is also shown by the manner in which employment practices were carried out at the two mines. No employee claims his rights under Section 7 were violated. Furthermore in the transition from Progressive to UMW, no employee at either mine lost his job. Membership in UMW was not a condition of employment. An employee did not need to belong to UMW to retain his employment.

Where two constructions of a written contract are possible, preference is given to that one which does not result in a violation of law. *Great Northern Railway Co.* v. *Delmar Co.*, 283 U.S. 686, 691.

The National Agreement by its own terms prevails over the District Agreement. The clear and unequivocal phrase in the National Agreement renders inoperative the union security provision of both agreements.

We hold the Board was in error in finding and concluding Peabody violated Section 8(a)(1) and (3) of the Act by entering into and maintaining a contract which contains closed shop provisions, and that UMW violated Section 8(b)(1)(A) and (2) of the Act by demanding, entering into and maintaining a contract which contained closed shop provisions.

The Board's order requires that Peabody and UMW jointly and severally "reimburse all employees for moneys illegally exacted from them" and to "make whole employees for any loss suffered by reason of the discriminatory discontinuation of the Progressive Fund payments." An issue which we must

decide is whether such a remedy is appropriate under the facts of this case.

The Supreme Court discussed the power of the Board to order affirmative remedies in *Republic Steel Corporation* v. *NLRB*, 311 U.S. 7. The Court there stated, page 11: "* * * We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' * * * (citing cases)."

In *Virginia Electric & Power Company* v *NLRB*, 319 U.S. 533, the Supreme Court held that reimbursement of dues was an appropriate remedy to effectuate the purposes of the Act. However, the Court expressly limited the decision in that case to the particular facts before it, and refused to express an opinion on the merits of eleven cases in five different circuits which refused to enforce similar Board orders. It is of interest to note that the *Virginia* case concerned a company-dominated union, and all the employees had to join the union and remain members thereof in order to retain their jobs.

In *Western Union Telegraph Company* v. *NLRB*, 2 Cir., 113 F.2d 992, the Court refused to enforce a refund order similar to the one here under consideration. The Court said, page 997: "It by no means inevitably follows, because an employer has so conducted himself towards a union as to disqualify it from acting as collective bargaining agent for all his employees, that he has inflicted pecuniary damage upon each member of the union * * *"

In his concurring opinion in the *Virginia* case, *supra*, Justice Frankfurter pointed out the significant distinction between cases like *Western Union* and *Virginia*. He said, 319 U.S., at page 545. "But the vital difference between the *Western Union* and this case is that, in the former, 'there was no evidence that

all those (employees) who asked to have their wages stopped did so in any part because they were coerced.' * * * Here the employees had no such choice; they could avoid the check-off of union dues only by giving up their jobs."

In *Local 357, Teamsters Union* v. *NLRB*, DC Cir., 275 F.2d 646, the Court refused to enforce a dues reimbursement order except as to an individual who was actually discriminated against by the illegal hiring-hall agreement. The Court said the order went too far in directing reimbursement to all casual employees.

It is the Board's view that the presumption of coercion is conclusive once the unfair labor practice is shown. However, in *NLRB* v. *United States Steel Corporation*, 3 Cir., 278 F.2d 896, the Court refused to accept this argument and declined to enforce the order because there was no evidence that any employee was coerced. The Court was under the impression that this Court had decided to the contrary in *NLRB* v. *Local 60 United Brotherhood of Carpenters*, 273 F.2d 699, but stated at page 90: "there is a growing body of authority, some of it very forcefully and clearly written, supporting our view."

In *NLRB* v. *Local 60, United Brotherhood of Carpenters*, this Court approved the Board's finding that the contract contained an unlawful closed shop clause. The Board ordered reimbursement and this Court said it was a proper remedy because the "record does support the Board's finding that such fees were coerced in that there was present an implicit threat of loss of job if those fees were not paid." (273 F.2d, at 703). Significantly, the opinion went on to hold, "The burden rested on the respondents to show that even without the unlawful discrimination, the Company's employees would have maintained their membership in Local 60." (273 F.2d, at 703). The Supreme Court has recognized the contrary holdings of our *Local 60* opinion and that of the District of Columbia Court of Appeals in the *Local 357* case, and has granted certiorari in both cases.

Of course, we shall follow the decision of this Court in the *Local 60* case if it is controlling under the facts of the instant case. For the reasons hereinafter stated, we hold that our decision in *Local 60* is not controlling in the case at bar.

In *Local 60*, not only was the hiring agreement found to be unlawful, but two employees were declined employment by reason thereof. This Court found reimbursement of dues proper "to restore employees to the position they would have enjoyed but for the illegal practices." (273 F.2d, at 703).

By contrast, in the case at bar, there are no findings that dues were paid under coercion or under any threat or implied threat of loss of job. In the instant case, no employee did lose his job in the change-over to UMW. No employee complained or testified that he was coerced into signing dues cards. There is clear evidence in the record that membership in UMW was not a condition of employment. Furthermore, at the time of the contract with Peabody, employees at both mines, by cards, and by election at O'Fallon, indicated their choice of UMW.

In the great majority of cases raising the issue of dues reimbursement, only one union was involved. In such cases, were it not for the unfair labor practices, it is quite possible the employees involved would not have paid any dues. Here the employees were all union men. True, they had been members of Progressive and not UMW, but during the period that UMW collected its dues, the employees received all of the rights and benefits of belonging to UMW. These employees would have paid union dues regardless of any unfair labor practices.

Inasmuch as there are no findings of actual coercion in the instant case nor any evidence which would have supported such findings, we hold that part of the order requiring reimbursement of dues paid, should not be enforced.

We next consider the requirement of the order that Peabody and UMW jointly and severally "make whole employees for any loss suffered by reason of the discriminatory discontinuation of the Progressive Fund payments." We note that payments were made by Peabody into that fund during the entire duration of the contract with Progressive. To say that at the time the old contract expired, a new contract would have been entered into with Progressive, would seem to be sheer speculation. The General Counsel asked the trial examiner to reinstate Progressive's contract but he refused to do so. The Board

makes no mention of this part of the examiner's intermediate report, so we assume the Board adopted the action of the trial examiner in that respect. Nevertheless, the Board's order, in effect, reinstates at least part of Progressive's contract.

Since October 1, 1957, Peabody has paid into UMW Welfare and Retirement Fund, royalty payments of 40 cents a ton for every ton which it has sold from the O'Fallon and Millstadt mines. If it had made payments into the Progressive Fund, the amount would have been 20 cents a ton. There should be no windfall to employees which might enable them to draw from both funds for the period when they would be entitled to receive payments from one or the other. Such part of the Board's order is penal in effect and should not be enforced.

UMW claims the order is too broad. It specifies three objections: 1) Paragraph 2(a) (3) of the order is merely a command to broadly obey the statute; 2) the order and notice should be limited to the employees of the two mines involved; and 3) the inclusion of "any other employer" is invalid in paragraph 2(b) (3) of the order.

The Board has the power to make an order like paragraph 2(a) (3), *NLRB* v. *Cheney California Lumber Co.*, 327 U.S. 385. Whether it is justified depends on the circumstances of each case. *NLRB* v. *Express Publishing Co.*, 312 U.S. 426. The Board argues the reason for the paragraph was that the illegal contract covered all Peabody employees. But, since we hold the contract is valid, the order should be limited to UMW's and Peabody's actual unfair labor practices in this case.

Under the authority of *NLRB* v. *United Brotherhood of Carpenters*, 7 Cir., 276 F.2d 694, the order should be limited to the employees of the two mines involved.

The words "or any other employer" in paragraph 2(b) (3) of the order should not be enforced. *Communications Workers* v. *NLRB*, 362 U.S. 479. UMW was not found to have engaged in violations against the employees of any employer other than Peabody. In any event, the whole clause should be stricken since the contract did not violate the Act.

The Order of the Board, modified as indicated in this opinion will be enforced.

No. 12889

SCHNACKENBERG, *Circuit Judge*. For the reasons set forth in my opinion in *Lewis* v. *Quality Coal Corporation*, 270 F. 2d. 140, 144, I dissent from those parts of Judge Duffy's opinion which are inconsistent with my said views.

In all other respects I concur with his opinion.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

ORDER

December 2, 1960

"This cause came on to be heard on the petitions to review and set aside an order of the National Labor Relations Board, the answer and request for enforcement of said order, the transcript of the record from the National Labor Relations Board, and was argued by counsel.

"In consideration whereof, it is ordered and adjudged by this Court that the order entered in this cause by the National Labor Relations Board on December 30, 1959, be modified as indicated in the opinion of this Court filed this day, and as so modified the said order will be enforced."

ORDER

Tuesday, January 17, 1961

"IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED."

DECREE

April 5, 1961

Before: DUFFY and SCHNACKENBERG, *Circuit Judges* and MERCER, *District Judge*.

This cause came on to be heard upon petition of Peabody Coal Company to review and set aside an order of the National Labor Relations Board, dated December 30, 1959, issued against Peabody and against the United Mine Workers of America, et al.; and also upon petition of the United Mine Workers of America, et al. to review and set aside the same order of the Board. In its answers and cross-petitions the Board requested enforcement of its order. The Court heard argument of respective counsel on September 27, 1960, and has considered the briefs and transcript of record filed in this cause. On December

2, 1960, the Court being fully advised in the premises, handed down its decision enforcing, as modified, said order of the Board. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Seventh Circuit that the Petitioner, Peabody Coal Company, its officers, agents, successors and assigns shall:

a. Cease and desist from

(1) Giving effect to the collective bargaining agreement entered into on or about October 1, 1957, with United Mine Workers of America, its District 12, and its Locals 1227 and 1229, or to any extension, renewal or modification thereof.

(2) Recognizing United Mine Workers of America, its District 12, and its Locals 1227 and 1229, as the representative of any of its employees at the O'Fallon and Millstadt mines for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment; unless and until said labor organizations shall have demonstrated their exclusive majority representative status pursuant to a Board conducted election among the Company's employees; said election to be conducted as early as possible under applicable rules, regulations and practices; it being understood that Peabody need not bargain with any union claiming to represent the employees at the O'Fallon and Millstadt mines until the Board has certified the results of the election so held.

(3) Assisting and contributing support to United Mine Workers of America, its District 12, and its Locals 1227 and 1229 or to any other labor organization.

(4) Encouraging membership in the above named labor organizations, or in any other labor organization of its employees, by discriminating in regard to hire or tenure of employment or any term or condition of employment, except to the extent permitted by the proviso to Section 8(a) (3) of the Act as modified by the Labor Management Reporting and Disclosure Act of 1959.

(5) In any other manner interfering with, restraining or

coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Progressive Mine Workers of America, District 1, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a) (3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

b. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from United Mine Workers of America, its District 12, and its Locals 1227 and 1229, as the representative of any of its employees at the Millstadt and O'Fallon mines for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until the said labor organizations shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among the said employees;

(2) Make whole all employees at its O'Fallon and Millstadt mines for any loss of earnings they may have suffered by reason of the discriminatory lockout, as found herein;

(3) Preserve and, upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all records necessary for the determination of the amount of back pay due under this Decree.

(4) Post at its Millstadt and O'Fallon mines copies of the notice attached hereto and marked "Appendix A." Copies of said notice to be furnished by the Regional Director for the Fourteenth Region shall, after being duly signed by Peabody's authorized representative, be posted immediately upon receipt thereof, in conspicuous places, including all places where notice to employees is customarily posted, and maintained for a period of sixty (60) consecutive days. Reasonable steps shall be taken

to insure that said notices are not altered, defaced, or covered by any other material;

(5) Post at the same places and under the same conditions as set forth in (4) above, and as soon as they are forwarded by the aforesaid Regional Director, copies of the Unions' notice herein, marked "Appendix B";

(6) File with the said Regional Director within ten (10) days from the date of this Decree a report setting forth in detail the steps which it has taken to comply with this Decree.

The United Mine Workers of America, its District 12, and its Locals 1227 and 1229; their officers, representatives, agents, successors and assigns, shall:

a. Cease and desist from

(1) Giving effect to the agreement of on or about October 1, 1957 with Peabody Coal Company, or to any extension, renewal, modification, supplement, or other contract with said employer, unless and until said labor organizations shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among the employees of Peabody Coal Company, at its O'Fallon and Millstadt mines;

(2) Restraining or coercing the employees of Peabody Coal Company, at its O'Fallon and Millstadt mines in the right to select or not to select the United Mine Workers, its District 12 and its Locals 1227 and 1229 as their bargaining representative and to join or not to join said labor organizations, except to the extent that such right may be affected by an agreement executed as authorized by the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Post at the business offices of District 12 and Locals 1227 and 1229, copies of the notice attached hereto and marked "Appendix B." Copies of said notice, to be furnished by the aforesaid Regional Director, shall, after being duly signed by an official representative, be posted immediately upon receipt thereof and be maintained for sixty (60) consecutive days

thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(2) Mail to the said Regional Director signed copies of the notice attached hereto and marked "Appendix B" for posting at the Company's Millstadt and O'Fallon mines;

(3) Notify the said Regional Director, in writing, within ten (10) days from the date of this Decree what steps the Unions have taken to comply with the Decree.

/s/ F. RYAN DUFFY
Judge, United States Court of Appeals for the Seventh Circuit

/s/ ELMER J. SCHNACKENBERG
Judge, United States Court of Appeals for the Seventh Circuit

/s/ FREDERICK O. MERCER
Judge, United States District Court, Southern District of Illinois, sitting by designation on Court of Appeals for the Seventh Circuit.

A True Copy:
Teste:

SEAL

/s/ KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX A

NOTICE TO ALL EMPLOYEES OF OUR O'FALLON AND MILLSTADT MINES PURSUANT TO

A Decree of the United States Court of Appeals for the Seventh Circuit enforcing an Order, as modified, of the National Labor Relations Board, and in order to effectuate the

policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT encourage membership in UNITED MINE WORKERS OF AMERICA, its District 12, and its LOCALS 1227 and 1229, or in any other labor organization of our employees, by discriminating in regard to hire, tenure, or any term or condition of employment, except to the extent authorized by Section 8(a) (3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL NOT give effect to any and all agreements, and contracts, supplements thereto or modifications thereof, or any superseding contract with the above-mentioned labor organizations with respect to the employees at the O'Fallon and Millstadt mines.

WE WILL NOT contribute support to the above-named labor organizations.

WE WILL withdraw and withhold recognition from the above-named labor organizations, or any successor thereto, with respect to the employees at the O'Fallon and Millstadt mines, unless and until they shall have demonstrated exclusive majority representative status pursuant to a Board-conducted election among our employees at the said mines.

The bargaining units are:

(1) All employees at the O'Fallon mine covered by the 1958 contract between Progressive and the Coal Producers Association of Illinois, and

(2) All employees at the Millstadt mine covered by the same contract, excluding such categories of employees as required by law.

WE WILL NOT give effect to any checkoff cards, heretofore executed by our employees, authorizing deductions from their wages for remittance to UNITED MINE WORKERS OF AMERICA, its District 12, and its LOCALS 1227 and 1229.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their statutory rights.

All our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8(a)(3) of the National Labor Relations Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

PEABODY COAL COMPANY
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

NOTICE

TO ALL MEMBERS OF UNITED MINE WORKERS OF AMERICA, ITS DISTRICT 12, AND ITS LOCALS 1227 and 1229, AND TO ALL EMPLOYEES OF PEABODY COAL COMPANY AT ITS MILLSTADT AND O'FALLON MINES

PURSUANT TO

A Decree of the United States Court of Appeals for the Seventh Circuit enforcing an Order, as modified, of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that.

WE WILL NOT give effect to our agreements of, on, or about October 1, 1957, or to any other contract with PEABODY COAL COMPANY covering employees at the above-named two mines, unless and until we shall have demonstrated our majority representative status pursuant to a Board-conducted election among employees at the aforesaid mines.

WE WILL NOT restrain or coerce the employees of the said employer in their right to select or not to select the United

Mine Workers, its District 12, and its Locals 1227 and 122 as their bargaining representative, and to join or not to join said labor organizations except to the extent that such righ may be affected by an agreement requiring membership in a labor organization as a condition of employment, executed in conformity with Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Ac of 1959.

UNITED MINE WORKERS OF AMERICA
(Labor Organization)

Dated By
(Representative) (Title)

DISTRICT 12, UNITED MINE WORKERS OF AMERICA

Dated By
(Representative) (Title)

LOCAL 1227, UNITED MINE WORKERS OF AMERICA
(Labor Organization)

Dated By
(Representative) (Title)

LOCAL 1229, UNITED MINE WORKERS OF AMERICA
(Labor Organization)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the dat hereof, and must not be altered, defaced, or covered by an other material.

APPENDIX C

Labor Management Relations Act, 1947:

29 USCA 157:

"*Right of employees as to organization, collective bargaining, etc.*

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title."

29 USCA 158:

"*Unfair labor practices*

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment

membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159(f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement;

". . . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

". . . . . .

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this sub-chapter if such expression contains no threat of reprisal or force or promise of benefit.

29 USCA 160:

"Petition to court for enforcement of order; proceedings; review of judgment

"(e) The Board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia), . . . for the enforcement of such order . . . Upon such filing, the court . . . shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

"Review of final order of Board on petition to court

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . . Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."